

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

JUN 15 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0197
Appellee,	)	2 CA-CR 2006-0200
	)	(Consolidated)
v.	)	DEPARTMENT B
	)	
GEORGE YSIDRO SPERLE and	)	<u>MEMORANDUM DECISION</u>
ROBERT BRYAN CLEERE,	)	Not for Publication
	)	Rule 111, Rules of
Appellants.	)	the Supreme Court
_____	)	

APPEALS FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CR2005-00146 and CR2005-00145

Honorable Thomas E. Collins, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
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B R A M M E R, Judge.

¶1 After a joint trial, a jury found appellants George Sperle and Robert Cleere guilty of kidnapping. Sperle and Cleere argue on appeal that the trial court erred by denying their motion for a mistrial and by issuing an arrest warrant for a witness who had failed to appear at trial. They also contend the court improperly granted the state’s motion in limine concerning impeachment of a witness and erred by admitting a firearm into evidence. Cleere separately argues the court erred by denying his motion for a new trial and by refusing to conduct a “residual doubt” analysis when sentencing him. Finding no error, we affirm.

### **Factual and Procedural Background**

¶2 On appeal, “[w]e view the facts in the light most favorable to sustaining the verdict[s].” *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On February 10, 2005, Sperle and Cleere went to Justine Smith’s mobile home to recover \$1,800 that Smith owed Cleere. Cleere lived part-time in a nearby mobile home belonging to his former wife.

¶3 After going into Smith’s mobile home, Sperle and Cleere found Smith and Shane McCauley in the bedroom. Upon entering the bedroom, Sperle ordered McCauley to show them his hands. Cleere then asked Smith, “[W]here is my money?” in a tone McCauley described as “[n]ot . . . nice[,] . . . a mean tone.” When Smith “went to go for her gun,” Sperle and Cleere “pulled out guns and pointed them at [McCauley] and [Smith].” Cleere took Smith’s gun “out of her hand,” and Sperle told McCauley to “stay in the corner” while Cleere “was getting as much money as he [could] from [Smith].” Sperle and Cleere told McCauley they would shoot him “if they didn’t get their money.” After taking money from

Smith, Sperle and Cleere then discussed a plan for Sperle to take McCauley to Cleere's mobile home while Cleere and Smith went to the bank so Smith could get more money for Cleere. At some point before leaving Smith's mobile home, Sperle and Cleere removed the batteries from her cordless telephone and McCauley's cellular telephone.

¶4 Sperle then "walked [McCauley] over to [Cleere's] trailer," where Sperle told the mobile home's occupant, Phillip Morris, to "keep an eye on" McCauley. After twenty to thirty minutes, Cleere came into the mobile home and said "he was going to count the money and send [McCauley] back with what was left." He gave McCauley about \$400, and McCauley "walked back to [Smith's] trailer and gave [the money] to her." McCauley reported the incident to police later that day.

¶5 The state charged Sperle and Cleere with armed robbery, conspiracy to commit armed robbery, theft by extortion, and kidnapping McCauley. Cleere was also charged with prohibited possession of a firearm. On the first day of trial, the trial court granted the state's motion to dismiss all but the kidnapping charges. After a four-day trial, the jury found both defendants guilty of kidnapping, but finding they had "[v]oluntarily release[d] Shane McCauley without physical injury in a safe place prior to arrest and prior to accomplishing holding Shane McCauley as a hostage," *see* A.R.S. § 13-1304(B), and also finding they had committed a dangerous offense, *see* A.R.S. § 13-604(F). The trial court denied Sperle and Cleere's motion for a new trial and their subsequent motion for reconsideration and sentenced each to presumptive prison terms of six years. This consolidated appeal followed.

## Discussion

### Motion for Mistrial

¶6 Sperle and Cleere contend the trial court erred “in denying the[ir] motion for mistrial” and “in issuing a bench warrant for a witness who had not been subpoenaed.” On the first day of trial, after the jury had been impaneled but before opening statements were given, the state moved to continue the trial “or recess until tomorrow morning” because McCauley, the first witness it intended to call, was not present. Despite having failed to subpoena McCauley to testify at trial, the state asked the court to “issue a warrant for [McCauley’s] arrest as a material witness.” Sperle and Cleere objected to the continuance and “move[d] for a dismissal of the charge[s],” reasoning that, if McCauley “is not going to be here,” the state could not prove the charges. The court granted the state’s motion “to continue or recess,” denied the motion to dismiss, and issued a warrant for McCauley’s arrest. McCauley was arrested that evening and testified on the second day of trial.

¶7 Although Sperle and Cleere contend the trial court erred by denying their motion for a mistrial, as the state correctly points out, they did not move for a mistrial. They instead moved to dismiss the charges based on insufficient evidence. We view this motion as one for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S.<sup>1</sup> A trial

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<sup>1</sup>A “motion to dismiss” could also be construed as a motion to dismiss a prosecution under Rule 16.6(b), Ariz. R. Crim. P., 16A A.R.S. That rule, however, only provides for dismissal if “the indictment, information, or complaint is insufficient as a matter of law” and does not address sufficiency of the evidence. *See State v. Rickard-Hughes*, 182 Ariz. 273, 275, 895 P.2d 1036, 1038 (App. 1995) (“Rule 16.6(b) is not the proper procedural means for

court may grant a motion for a judgment of acquittal under Rule 20 “if there is no substantial evidence to warrant a conviction.” “However, a Rule 20 acquittal may not be entered until ‘the evidence on either side is closed.’” *State v. Rickard-Hughes*, 182 Ariz. 273, 275, 895 P.2d 1036, 1038 (App. 1995), *quoting* Ariz. R. Crim. P. 20; *see also* *State v. Gradillas*, 25 Ariz. App. 510, 512, 544 P.2d 1111, 1113 (1976) (“The granting [of] a judgment of acquittal at a motion to suppress hearing and prior to trial was improper.”). Clearly, the motion for acquittal Sperle and Cleere made based on insufficient evidence was premature; the state had explained that, if McCauley was “not secured by tomorrow,” it could proceed with Smith as a witness. Accordingly, the court did not abuse its discretion in denying Sperle and Cleere’s motion. *See State v. Hollenback*, 212 Ariz. 12, ¶ 3, 126 P.3d 159, 161 (App. 2005) (“We review the denial of a Rule 20 motion for an abuse of discretion.”).

¶8 As we noted, the trial court granted the state’s motion to continue the trial. “[T]he granting of a continuance because of the absence of . . . a material witness is well within the trial court’s discretion. The trial court’s ruling on such a motion will not be disturbed unless an abuse of discretion and prejudice are clearly established.” *State v. Nadler*, 129 Ariz. 19, 22, 628 P.2d 56, 59 (App. 1981) (citation omitted). And “[t]he prejudice that a defendant must show . . . must go to his inability to present a defense, not to the state’s ability to make its case.” *State v. Kasten*, 170 Ariz. 224, 227, 823 P.2d 91, 94

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dismissal when the trial judge believes the evidence against the defendant is insufficient to go to the jury.”).

(App. 1991). As the state correctly observes, Sperle and Cleere make no attempt to demonstrate the delay interfered with their ability to present their defense.<sup>2</sup> Nor does the record suggest any interference occurred: the delay was minimal, as the trial was only continued from mid-afternoon to the following morning, and Sperle and Cleere thoroughly cross-examined McCauley.

¶9 Sperle and Cleere also argue the trial court, by issuing an arrest warrant for McCauley, “reverted to the role of second prosecutor to cover for the assigned prosecutor’s lack of diligence” in failing to subpoena him and, consequently, violated their due process and fair trial rights. Although we agree the procedure the court used was incorrect,<sup>3</sup> we do not see how Sperle or Cleere were thereby harmed. They identify nothing suggesting McCauley’s testimony would have been materially different had he been compelled to appear by subpoena instead of being forced to appear by arrest.<sup>4</sup> *See State v. Jones*, 188 Ariz. 534,

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<sup>2</sup>In Sperle’s reply brief, he appears to argue he and Cleere were prejudiced because McCauley “testified consistently with the State’s position” under a grant of use immunity. McCauley’s testimony, however, does not suggest he would have testified otherwise had he appeared on the first day of trial, whether voluntarily or in response to a subpoena.

<sup>3</sup>The state asserts “the legislature has specifically granted trial courts” the authority to “issu[e] an arrest warrant to ensure the attendance of a witness.” Although we agree with this general statement of the law, nothing permits a trial court to issue an arrest warrant unless a witness has failed to comply with a subpoena, *see* A.R.S. § 13-4073, or in the absence of the court’s compliance with the statutes governing material witnesses, A.R.S. §§ 13-4081 through 13-4084. Both were absent here.

<sup>4</sup>At trial, defense counsel asked McCauley why he had not appeared the previous day. McCauley testified that he “was afraid of [Sperle’s and Cleere’s] coming after [him] if [he] testified against them.” Sperle and Cleere argue the state “precipitated” this exchange by failing to subpoena McCauley. Any error caused by McCauley’s testimony, however, was

546, 937 P.2d 1182, 1194 (App. 1996) (defendant’s fair trial rights not violated by witnesses being unlawfully detained before testifying because “there is no evidence that the violations of the [witnesses’] due process rights caused them to alter their trial testimony”). Although the cross-examination of McCauley revealed some inconsistencies between his trial testimony and the statement he had previously made to police, none of the discrepancies is sufficient to suggest his testimony had been coerced or influenced by his arrest.<sup>5</sup> Thus, although the court might have violated McCauley’s rights, it did not violate Sperle’s or Cleere’s. *See Jones*, 188 Ariz. at 546, 937 P.2d at 1194 (trial court violated witnesses’ due process rights by unlawfully detaining them, but “the rights we are concerned with here are those of defendant, not the [witnesses]”); *see also State v. Reid*, 114 Ariz. 16, 25, 559 P.2d 136, 145 (1976) (“Confinement of a witness, even for a few days, not charged with a crime, is a harsh and oppressive measure which we believe is justified only in the most extreme circumstances.”).

¶10 Finally, even if we characterize Sperle and Cleere’s motion to dismiss as a motion for a mistrial, as they assert we should, the trial court did not err in denying it. “The

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clearly invited by the defense when it questioned him about his failure to appear. “[W]e will not find reversible error when the party complaining of it invited the error.” *State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001).

<sup>5</sup>After trial, but before sentencing, McCauley sent a letter to defendants’ attorneys recanting portions of his testimony and asserting it had been coerced. After appearing at a hearing pursuant to Sperle and Cleere’s motion to vacate the judgments, he apparently withdrew his recantation. Neither defendant discusses this matter on appeal; consequently, we do not consider it.

trial court has broad discretion to decide whether a mistrial is warranted.” *State v. Maximo*, 170 Ariz. 94, 98, 821 P.2d 1379, 1383 (App. 1991). “Declaring a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that that is the only remedy to ensure justice is done.” *Id.* at 98-99, 821 P.2d at 1383-84. As we have explained, the court did not err in denying the defendant’s motion to dismiss or in granting the state’s motion to continue. Nor did it violate Sperle’s or Cleere’s constitutional rights by issuing a warrant for McCauley’s arrest. Thus, there was no error that would warrant a mistrial.

#### Impeachment of Phillip Morris

¶11 Sperle and Cleere next argue the trial court abused its discretion by granting the state’s motion in limine concerning impeachment evidence against Phillip Morris. Sperle and Cleere sought to impeach Morris on several grounds: a 1997 felony conviction for driving under the influence of an intoxicant (DUI), a misdemeanor theft conviction, and several pending investigations by the Cochise County attorney that involved him. The court precluded impeachment on all grounds except the misdemeanor theft conviction, which the state agreed was “legitimate [for] cross-examination.”

¶12 Sperle and Cleere assert the trial court erred by precluding them from impeaching Morris with his felony DUI conviction because “a felony conviction is always admissible on the issue of credibility,” relying on *State v. Hernandez*, 191 Ariz. 553, 959 P.2d 810 (App. 1998). We review a trial court’s decision to admit evidence of a witness’s

prior conviction for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995). Division One of this court stated in *Hernandez* that a trial court may admit evidence of prior felony convictions even if they do not “directly involve[] an act that involves dishonesty or false statement.” 191 Ariz. 553, ¶ 12, 959 P.2d at 815. Such evidence, however, must meet the requirements of Rule 609, Ariz. R. Evid., 17A A.R.S. *Hernandez*, 191 Ariz. 553, ¶ 12, 959 P.2d at 814. Therefore, the probative value of the evidence must outweigh its prejudicial effect. *Bolton*, 182 Ariz. at 302, 896 P.2d at 842.

¶13 Because Morris’s DUI conviction was less than ten years old, Rule 609(a) governs its admissibility. *See* Ariz. R. Evid. 609(b). Our supreme court has identified several factors a trial court should consider in determining the admissibility of a prior conviction under Rule 609(a). *State v. Williams*, 144 Ariz. 433, 438, 698 P.2d 678, 683 (1985). Relevant here, the court should consider the “impeachment value of the prior [conviction], [the] length of time since the prior conviction, the witness’ history since the prior conviction, . . . the importance of [the witness’s] testimony, and the ‘centrality of the credibility issue.’” *Id.*, quoting *State v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976).

¶14 Although a felony DUI conviction has some impeachment value, *see Hernandez*, 191 Ariz. 553, ¶ 12, 959 P.2d at 815, it is not strongly probative of a witness’s veracity because it does not necessarily involve dishonesty or false statements.<sup>6</sup> *Cf.* Ariz. R.

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<sup>6</sup>Sperle and Cleere argue that, “in order to get [to] the stage where [a] DUI offense is elevated into a felony offense, the individual must have shown a blatant disregard for the law, a repeated inability to learn from his past mistakes and a serious drinking problem which

Evid. 609(a). And the fact the conviction was eight years old weighed against its admission. The third *Williams* factor, the witness's history since the conviction, weighed slightly in favor of admission because of Morris's 2001 misdemeanor theft conviction. However, the fact that Morris was impeached with that theft conviction significantly reduced the DUI conviction's additional impeachment value because the theft conviction is both more recent and significantly more relevant to his honesty and credibility.

¶15 Turning to the last two *Williams* factors, Morris's testimony was consistent with McCauley's; he testified that McCauley was "crying" when Sperle "escort[ed]" him to Cleere's trailer and that Sperle had a gun. Morris also contradicted Cleere's testimony in several ways. Contrary to Morris's testimony, Cleere asserted Sperle had not been armed. And Cleere testified he had lent Smith the money she owed him so she could buy beautician's equipment. In contrast, Morris testified Cleere had given the money to Smith to purchase methamphetamine for Cleere. McCauley's testimony, however, included all the facts necessary to prove the elements of kidnapping. *See generally* A.R.S. §§ 13-1301, 13-1304. Thus, because Morris's testimony was helpful to the state but not critical, we conclude the final two *Williams* factors weighed neither in favor of nor against permitting Morris to be impeached with his prior DUI conviction. Therefore, considering the *Williams* factors,

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most likely rolls over into other aspects of the individual's character." Thus, they reason, "the impeachment value of Morris' prior felony DUI conviction was quite substantial." In support, they cite Arizona law to demonstrate that a felony DUI conviction requires some prior criminal conduct. Morris's conviction, however, occurred in Wisconsin, and we decline to speculate about the circumstances leading to it.

particularly the relatively low impeachment value of the prior DUI conviction and the fact that Morris was impeached with a more recent prior conviction that was significantly more probative of his honesty and credibility, the trial court did not abuse its discretion in precluding Morris from being impeached with his prior DUI conviction. *See Bolton*, 182 Ariz. at 303, 896 P.2d at 843.

¶16 Sperle and Cleere also contend the trial court further erred by precluding them from impeaching Morris based on three pending investigations by the Cochise County attorney involving him. In those investigations, Morris apparently had “admitted to a police officer that he was in possession of stolen weapons.” Sperle and Cleere assert these incidents were admissible for impeachment purposes under Rule 608(b), Ariz. R. Evid., 17A A.R.S. Rule 608(b) permits introduction of “[s]pecific instances of the conduct of a witness” that are “probative of [the witness’s] truthfulness or untruthfulness.” We review a trial court’s decision under Rule 608 for an abuse of discretion. *State v. Murray*, 184 Ariz. 9, 30, 906 P.2d 542, 563 (1995). The evidence is only admissible if “the probative value of the conduct is substantially outweighed by the danger of unfair prejudice, confusion, or waste of time.” *Id.* Sperle and Cleere were permitted to impeach Morris with his theft conviction. Additional impeachment would have been cumulative and, because it would have involved only investigations and not criminal convictions, would have been considerably less probative of his veracity. *See Ariz. R. Evid.* 403, 17A A.R.S. (relevant evidence may be excluded if needlessly cumulative). Thus, we cannot say the court abused its discretion by

precluding impeachment based on those pending investigations. *See Murray*, 184 Ariz. at 30, 906 P.2d at 563.

¶17 Moreover, we agree with the state that any error was harmless. *See State v. Beasley*, 205 Ariz. 334, ¶ 27, 70 P.3d 463, 469 (App. 2003) (“Despite finding an abuse of discretion, we may still affirm the action of the trial court if the error is harmless beyond a reasonable doubt.”). Morris admitted several recent criminal acts, including that he had brokered the drug transaction between Cleere and Smith and had purchased illegal drugs from Smith. Moreover, Morris testified that his prior theft conviction had been a felony that was only “designated a misdemeanor” after he completed probation and that the conviction had involved stolen weapons. Thus, given the significant evidence in the record casting doubt on Morris’s credibility, we can say beyond a reasonable doubt that admission of the excluded evidence would not have affected the outcome. *See State v. Dunlap*, 187 Ariz. 441, 456, 930 P.2d 518, 533 (App. 1996) (“Error is harmless if we can say beyond a reasonable doubt that the error did not affect the verdict.”).

#### Admission of Exhibit Two

¶18 At trial, the state admitted exhibit two, a double-barreled firearm police officers had found in Cleere’s mobile home—the same mobile home to which McCauley had been taken during the kidnapping. Sperle argues the trial court erred by admitting the gun, claiming its prejudicial value outweighed its relevance. In a related argument, Cleere contends the state failed to properly authenticate the gun as required by Rule 901, Ariz. R.

Evid., 17A A.R.S. We review a trial court’s decision on the admissibility of evidence for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004).

¶19 McCauley testified Cleere had a “small double barrel pistol” during the kidnapping. When shown exhibit two at trial, although he agreed it was a double-barreled pistol, he also stated it “wasn’t the one” Cleere had been holding. Sperle and Cleere later moved in limine to preclude further discussion of exhibit two, arguing that, because McCauley had failed to identify the gun, “it’s not relevant to the case.” The trial court denied the motion, stating, “Just because he says that’s not the one, that goes to the weight not to the admiss[i]bility.” City of Tombstone Deputy Marshal Dave Bunnell identified exhibit two as the same gun he had found at Cleere’s mobile home, saying it was “a kind of unique two barreled gun.” The court then admitted exhibit two into evidence without objection from either Sperle or Cleere.<sup>7</sup>

¶20 Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

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<sup>7</sup>The state asserts both Sperle and Cleere have waived any objection to the pistol’s admission. Both of them objected at trial to any testimony about the weapon, but failed to specifically object to its admission as an exhibit. These issues are sufficiently related to permit us to address the issue on its merits. *See State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975) (finding motion in limine to exclude evidence preserved issue for appeal because “[t]he essential question is whether or not the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived.”)

probable than it would be without the evidence.” Ariz. R. Evid. 401, 17A A.R.S. Relevant evidence is admissible, Rule 402, Ariz. R. Evid., 17A A.R.S., unless “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Ariz. R. Evid. 403.

¶21 Sperle apparently argues admitting the gun was unfairly prejudicial because it “was entered into evidence to prove that [Sperle] and Cleere were armed with it, when in fact McCauley and Cleere both stated they were not armed with that gun.” However, the jury could have readily concluded the gun Bunnell had found was the same gun McCauley described Cleere as holding. The gun matched McCauley’s description of it, and Bunnell testified that he had found the gun in Cleere’s mobile home and, without objection, that it was “unique.” These facts would permit the jury to infer it was unlikely Cleere had held a double-barreled gun different from exhibit two during the kidnapping. That there was contrary evidence, including McCauley’s failure to recognize the gun, did not render the firearm inadmissible. As the trial court correctly noted, those matters go to the weight of the evidence, not its admissibility. *See State v. Skelton*, 129 Ariz. 181, 183, 629 P.2d 1017, 1019 (App. 1981) (“[T]he lack of positive identification goes only to the weight and not the admissibility of the evidence.”).

¶22 “Relevant evidence generally will adversely affect the party against whom it is offered, but that is not the type of prejudice of which Rule 403 speaks.” *Yauch v. S. Pac.*

*Transp. Co.*, 198 Ariz. 394, ¶ 28, 10 P.3d 1181, 1191 (App. 2000). Instead, unfair prejudice under Rule 403 “results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.” *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Exhibit two was clearly relevant; as we have explained, the jury could have concluded exhibit two was the same gun Cleere had held during the kidnapping. And Sperle has failed to demonstrate the type of prejudice Rule 403 contemplates, much less sufficient prejudice to overcome the gun’s probative value.

¶23 Cleere’s argument is equally unavailing. He asserts “no witness was able to authenticate the gun” as required by Rule 901. Rule 901 provides that authentication or identification is “a condition precedent to admissibility” and “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” “Foundation for evidence can be established by either chain of custody or identification testimony.” *State v. Emery*, 141 Ariz. 549, 551, 688 P.2d 175, 177 (1984).

A party can satisfy this requirement in a variety of ways: a witness can testify that the item is what it is claimed to be, Ariz. R. Evid. 901(b)(1), or the evidence can be shown to have distinctive characteristics which, taken in conjunction with circumstances, support a finding that it is what its proponent claims, Ariz. R. Evid. 901(b)(4).

141 Ariz. at 551, 688 P.2d at 177. Bunnell testified exhibit two was the same gun he had found in Cleere’s mobile home. And, as we have explained, a jury could properly infer it was the same gun Cleere had used during the kidnapping. Nothing more was required under Rule 901. Accordingly, for the reasons stated above, we conclude the trial court did not

abuse its discretion by admitting exhibit two into evidence. *See Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d at 473.

### Motion for New Trial

¶24 In their motion for a new trial made pursuant to Rule 24.1, Ariz. R. Crim. P., 17 A.R.S., Sperle and Cleere argued “the jury verdict finding of dangerousness is not supported by sufficient evidence,” asserting the state had not presented any evidence “that any of the three guns admitted had been tested for operability.” Whether the guns Sperle and Cleere had used during the kidnapping were operable is relevant to the jury’s finding that Sperle and Cleere had committed a dangerous offense under A.R.S. § 13-604(F). That finding increased their presumptive prison terms from 2.5 years to six years. *See* A.R.S. §§ 13-701, 13-604(F). The trial court denied the motion, stating it was Sperle’s and Cleere’s burden to prove the guns were permanently inoperable as an affirmative defense under *State v. Rosthenhausler*, 147 Ariz. 486, 493, 711 P.2d 625, 632 (App. 1985), and Sperle and Cleere had “only offered evidence that [one of the guns] was permanently inoperable.”

¶25 On appeal, Cleere argues the trial court erred in “failing to require the state to prove that the guns it entered in evidence were operable” and, thus, erred in denying his motion for a new trial. “Motions for new trial are disfavored and should be granted with great caution.” *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996), *quoting State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). We “will not disturb a trial court’s denial of a motion for new trial absent an abuse of discretion.” *Id.*

¶26 Although the trial court ruled Sperle and Cleere had the burden of proving the guns were permanently inoperable, nothing in the record suggests the jury was instructed accordingly.<sup>8</sup> Indeed, according to Cleere, the jury was properly instructed, and he characterizes his argument as “one . . . of insufficiency of evidence.”<sup>9</sup> Although the court denied Cleere’s motion for new trial as a matter of law, we may affirm the ruling for any

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<sup>8</sup>The jury instructions are not contained in the record on appeal. The parties agree the jury was given the statutory definition of “firearm” and the trial court permitted the defense to argue the state had not proven the guns were operable. Cleere does not argue this procedure was improper.

<sup>9</sup>Cleere correctly notes that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000); *see also Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004) (clarifying right to jury trial applies to aggravating factors such as those in Arizona’s noncapital sentencing scheme). “In Arizona, the statutory maximum is the presumptive term.” *State v. Molina*, 211 Ariz. 130, ¶ 14, 118 P.3d 1094, 1098 (App. 2005). Thus, Cleere reasons, the state was required to prove the guns were operable because that fact was “an integral part of Arizona’s statutory definition” of a firearm and, thus, is “an essential element of the sentencing enhancement.” Because Cleere does not argue the jury was improperly instructed, and the evidence supports the jury’s verdict, we do not address this issue. We note, however, that the jury was likely improperly instructed to Cleere’s benefit. *Apprendi* has not eliminated affirmative defenses. *United States v. Brown*, 276 F.3d 930, 932 (7th Cir. 2002) (“*Apprendi* leaves undisturbed the principle that while the prosecution must indeed prove all the elements of the offense charged beyond a reasonable doubt, the legislation creating the offense can place the burden of proving affirmative defenses on the defendant.”) (citation omitted). In Arizona, under A.R.S. § 13-105(17), “the burden is upon appellant to come forward with evidence establishing a ‘reasonable doubt’ as to the operability of the firearm. The state is not relieved of proving the elements of the offenses charged; however, the state need not disprove beyond a reasonable doubt appellant’s affirmative defense of permanent inoperability of the firearm.” *State v. Rosthenhausler*, 147 Ariz. 486, 493, 711 P.2d 625, 632 (App. 1985).

reason supported by the record. *See State v. Nadler*, 129 Ariz. 19, 21-22, 628 P.2d 56, 58-59 (App. 1981).

¶27 Section 13-105(17), A.R.S., defines a firearm as “any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other weapon which will or is designed to or may readily be converted to expel a projectile by the action of expanding gases, except that it does not include a firearm in permanently inoperable condition.” Thus, in order for a firearm to be a “deadly weapon” under § 13-604(F), it must not be permanently inoperable. *State v. Spratt*, 126 Ariz. 184, 186, 613 P.2d 848, 850 (App. 1980). We note that, despite Cleere’s assertion to the contrary, § 13-105(17) does not define a firearm as “operable,” but instead excludes from the definition of firearm those that are “*permanently* inoperable.” (Emphasis added.)

¶28 “A new trial under rule 24 is required only if ‘the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime.’” *Spears*, 184 Ariz. at 290, 908 P.2d at 1075, *quoting State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). “In determining the sufficiency of the evidence, we view the evidence in the light most favorable to sustaining the verdict, and we resolve all inferences against defendant.” *Id.* As we have explained, the double-barreled gun, exhibit two, was properly admitted, and the jury could have reasonably inferred that exhibit two was the same gun Cleere had used during the kidnapping. Bunnell testified that, when he found that gun in Cleere’s mobile home, it had been loaded. That the weapon had been loaded supports the

inference it was not permanently inoperable. Furthermore, Cleere testified exhibit two was “operable.” Thus, the jury could conclude, beyond a reasonable doubt, that the gun Cleere displayed during the kidnapping was not permanently inoperable, *see id.*, and, therefore, was a firearm as defined by § 13-105(17).<sup>10</sup> The trial court did not err in denying Cleere’s motion for a new trial.

### Residual Doubt

¶29 Cleere also asserts the trial court erred by concluding it “did not have the authority” to consider residual doubt about his guilt as a potential mitigating factor at sentencing. But, in the context of a noncapital case, Cleere cites no Arizona statutory or case authority that either endorses or prohibits a sentencing court’s consideration of residual doubt as a sentencing factor.

¶30 And, although Cleere is correct that the residual doubt issue has occasionally been addressed by our supreme court in the capital sentencing context, that unsettled jurisprudence provides him little assistance on the question of whether the trial court erred here when it found no authority either requiring or permitting it to consider such evidence in sentencing him in this noncapital case. *Compare State v. Rockwell*, 161 Ariz. 5, 15-16, 775 P.2d 1069, 1079-80 (1989) (implicitly finding residual doubt as part of “significant

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<sup>10</sup> Although Sperle does not raise this issue on appeal, we note that “[a] defendant need not be in [physical] possession of a deadly weapon to receive the enhanced punishment” under A.R.S. § 13-604(F). *State v. Royston*, 135 Ariz. 566, 567, 663 P.2d 250, 251 (App. 1983).

mitigating evidence” outweighing lone aggravating factor), *with State v. Carriger*, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984) (rejecting claim that “difference between absolute certainty and the beyond a reasonable doubt standard” should be mitigating factor).

¶31 In *State v. Harrod*, 200 Ariz. 309, ¶ 55, 26 P.3d 492, 502 (2001), *vacated on other grounds*, 536 U.S. 953, 122 S. Ct. 2653 (2002), our supreme court expressly declined to reach the question of whether residual or lingering doubt can be considered a nonstatutory mitigating factor at sentencing in a capital case. It is interesting to note that three justices specially concurred to offer varying opinions on the matter. Justice Jones, specially concurring, stated: “Because I conclude that consideration of residual doubt at sentencing does not fall within the permissible scope of A.R.S. § 13-703(G), the defendant’s residual doubt argument raises a question that is best addressed to the legislature.” 200 Ariz. 309, ¶ 71, 26 P.3d at 504. Justice Feldman, joined by Chief Justice Zlaket, also specially concurring, further said: “Residual doubt . . . should be considered a substantial mitigating circumstance, and the court should say so.” *Id.* ¶ 86.

¶32 Thus, although Cleere correctly notes “[t]here is no case holding that residual doubt analysis is impermissible under Arizona law,” he fails to provide any authority requiring us to overturn the trial court’s conclusion that it was not permitted to conduct such an analysis when sentencing him in this noncapital case. Nor does he argue that our legislature has expressly or implicitly authorized a sentencing court in circumstances similar

to his to consider residual doubt—a complex question we therefore do not address.<sup>11</sup> Because Cleere has not demonstrated the court erred when it declined to consider evidence of residual doubt as a mitigating circumstance in sentencing him, we will not overturn his sentence on this ground because it refused to do so.

### **Disposition**

¶33 We affirm Sperle’s and Cleere’s convictions and sentences.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

E S P I N O S A, Judge, specially concurring.

¶34 I concur in all respects except as to what I view as some entirely unnecessary comments about the so-called “residual doubt” doctrine. I write separately to make clear that if it can be said the law in Arizona is “unsettled” on this subject, it is only in the very different and limited context of whether the death penalty should have been imposed in two

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<sup>11</sup>The most relevant provision, A.R.S. § 13-702(D)(6), authorizes a trial court to consider as a mitigating circumstance “[a]ny . . . factor that is relevant to the defendant’s character or background or to the nature and circumstances of the crime.”

isolated cases, one drawing separate concurrences by two former supreme court justices. *See Harrod*, 200 Ariz. 309, ¶ 67-97, 26 P.3d at 503-09 (Jones, J. and Feldman, J. specially concurring). The other, *Rockwell*, 161 Ariz. at 15-16, 775 P.2d at 1079, 80, arguably alluded to such a concept but primarily relied on mitigating evidence related to the defendant's background and circumstances. In an earlier case, *Carriger*, 143 Ariz. at 162, 692 P.2d at 1011, our supreme court expressly rejected the notion of residual doubt and it has never been adopted in any subsequent decision. Accordingly, the trial court's refusal to entertain this theory was well justified and I agree it committed no error.

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PHILIP G. ESPINOSA, Judge